REMARKS

Applicant has carefully reviewed and considered the Office Action mailed on November 28, 2007, and the references cited therewith. Applicant respectfully requests reconsideration of the pending claims in view of the following comments.

Claims 24-25 have been canceled. As such, claims 1, 6, 7, and 10-12 are now pending in this application. Claim 1 has been amended. No new matter has been added. Support for amendment to Claim 1 can be found at least in FIGS. 2-4 and 6-7.

§102 Rejection of the Claims

Claim 1 was rejected under 35 USC § 102(b) as being anticipated by Fougeres (USPN 4,978,024). Applicants respectfully traverse this rejection.

Applicants respectfully point out that "to anticipate a claim, the reference must teach every element of the claim". See MPEP § 2131.

As amended, claim 1 now requires that "the reinforcing structure defines an aperture aligned with the hole defined by the first and second sidewalls". It is clear that the "one layer of additional material (28)" of Fougeres does not define an aperture aligned with the hole defined by the first and second sidewalls. As such, Fougeres fails to teach or suggest every element of the claims. For at least this reason, Applicants respectfully request that this rejection be withdrawn.

§103 Rejection of the Claims

Claims 1, 7 and 10-12 were rejected under 35 USC § 103(a) as being unpatentable over Etesse (European Patent No. 0630822), Berthelsen (European Patent No. 0248679), and Fougeres. Applicants respectfully traverse this rejection.

In response to this rejection, Applicants previously argued that the Sturgis Declaration (originally submitted to the U.S. Patent and Trademark Office on December 20, 2006) clearly establishes that bags including the features of claim 1 have achieved dramatic commercial success and therefore show that the invention as claimed is not obvious over the combination of Etesse, Berthelsen, and Fougeres.

The Examiner responded by stating that "gross sales figures do not show commercial success absent evidence as to market share" citing Cable Electric Products, Inc. v. Genmark, Inc., 770 F.2d 1015, 226 USPQ 881 (Fed Cir. 1985).

In further response, Applicants point out that paragraph 5 of the Declaration of Sheldon Sturgis states that sales of products packaged in seed bags with the claimed features increased by over 513 percent between 2002 and 2005. Paragraph 5 goes on to state that "over the same time period, the wild bird food and grass seed markets grew at a rate not significantly greater than inflation." Logically then, the market share of the products packaged in seed bags with the claimed features must have increased substantially. As such, it is asserted that sufficient evidence regarding market share has been provided by Applicants.

Supporting this point further, Applicants also point out that paragraph 7 of the Declaration of Sheldon Sturgis states that "no substantial advertising was done to promote the wild bird food and grass seed products sold by Performance Seed over the period of time from 2002 to 2005." Indeed, as clearly stated in paragraph 6 of the Declaration of Sheldon Sturgis "wild bird food and grass seed products...are commodity products" and the products sold by Performance Seed are "largely undifferentiated" from competitive products except for the bags that they are sold in. As such, logic suggests that the features of the seed bags are responsible for the remarkable increase in market share.

Further, market research studies can be used to support an assertion of commercial success. See *Winner International Royalty Corp. v. Wang*, 202 F.3d 1340, 53 USPQ2d 1580 (Fed. Cir. 2000). In this case, market research studies were performed which support the nexus between the claimed features and the demonstrated commercial success. The Declaration of Sheldon Sturgis documents the results of the market research studies that were commissioned by Mr. Sturgis. The conclusions from these market studies were so significant that they are worth repeating here:

> "The 2003 study's primary conclusion was that all participants felt that the claimed features made it easier to carry and pour the bagged product. The participants felt that these claimed features made a significant difference in the product's value, and that the claimed features would be the determining factor in the purchase of bird food assuming a

comparable quality bird food and a competitive price. The participants in the market research study unanimously indicated that they would purchase bird food and lawn seed in bags with the claimed features if the quality and price of the product were comparable to that of products in traditional packages." See Sturgis Declaration at 10a.

"The 2004 study's primary conclusion was that the claimed features set our products apart distinctly from competitive products. The participants in the study group noticed that claimed features right away and unanimously indicated that these features made it easier to carry and pour the product. Some people indicated that they would pay more for a product including the claimed features." See Sturgis Declaration at 10b.

As such, the results of the market research studies strongly support the nexus between the dramatic commercial success and the claimed features.

Finally, Applicants remind the Examiner that a showing of secondary considerations need only be commensurate with the scope of the claims. See Hewlett-Packard Co. v. Bausch & Lomb Inc., 909 F.2d 1464, 15 USPQ2d 1525 (Fed. Cir. 1990). In this case, the scope of the claims is relatively narrow. As such, even a moderate showing of commercial success would be sufficient to support the view that the claims are not obvious over the cited prior art. In this case, Applicants assert that the required showing of commercial success has been adequately provided.

For at least these reasons, including those arguments previously presented, Applicants respectfully assert that claim 1 is not rendered obvious by Etesse in view of Berthelsen and Fougeres. As claims 7 and 10-12 are dependent on claim 1, they are also not rendered obvious by Etesse in view of Berthelsen and Fougeres. Applicants respectfully request that this rejection be withdrawn.

Claim 6 was rejected under 35 U.S.C. § 103(a) as being unpatenable over Etesse, Berthelsen et al. and Fougeres, as applied to claim 1 above, and further in view of Japanese Patent No. 3-226460 to Toshiji Shimamoto. Applicants respectfully traverse this rejection.

Applicants again draw the attention of the Examiner to the Sturgis Declaration. For the reasons described above, the Sturgis Declaration is clearly sufficient to show that the invention

as claimed is not obvious over the combination of Etesse, Berthelsen, Fougeres, and Shimamoto. Therefore, Applicants respectfully request that this rejection be withdrawn.

Claims 24 and 25 were rejected under 35 U.S.C. § 103(a) as being unpatentable over Anspacher (U.S. 5,782,562) and Rantanen (U.S. 4,971,453).

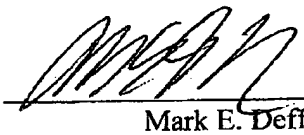
While not conceding the correctness of the rejection, in the interest of advancing prosecution, Applicants have canceled claims 24 and 25 obviating this rejection.

Conclusion

Applicant respectfully submits that the claims are in condition for allowance and notification to that effect is earnestly requested. The Examiner is invited to telephone Applicant's attorney (612-746-4782) to facilitate prosecution of this application.

If necessary, please charge any additional fees or credit overpayment to Deposit Account No. 50-3688.

Respectfully submitted,

Date May 28, 2008 By 

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